

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3

4 Nautilus Insurance Company,
5 Plaintiff
6 v.
7 Access Medical, LLC, et al.,
8 Defendants

Case No.: 2:15-cv-00321-JAD-GWF

**Order Denying Application to Consider
Motion for Relief from Judgment**

[ECF Nos. 126, 127]

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10 I previously granted summary judgment in Nautilus Insurance Company’s favor on its
11 claims for a declaration that it did not owe a duty to defend or indemnify its insureds, defendants
12 Access Medical, LLC; Flournoy Management, LLC; and Robert Clark Wood, II, regarding
13 matters at issue in a California state-court tort-and-contract case.¹ I recognized that, under
14 Nevada law, an insurer’s duty to defend “may be triggered by facts known to the insurer through
15 extrinsic sources or by factual allegations in” a pleading.² The defendants offered both a
16 pleading (cross-complaint against them in the California action) and an extrinsic source (email
17 dated July 25, 2011) that they argued contained coverage-triggering facts. I considered both
18 sources but found that neither triggered “Nautilus’s duty to defend under the ‘personal and
19 advertising injury’ provision of the policy” because the facts contained in them did not “give rise
20 to a potential claim for slander, libel, or disparagement”³ So, I entered summary judgment
21 in Nautilus’s favor on its declaratory-relief claims and declared that it did not owe a duty to
22 defend the defendants under the policy.⁴
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25 ¹ ECF No. 70.

26 ² *Id.* at 8.

27 ³ *Id.* at 9.

28 ⁴ *Id.* at 11.

1 After the defendants appealed from my order,⁵ they applied on an emergency basis for an
2 order stating that I would entertain or grant their proposed motion for relief from the judgment
3 under FRCP 60(b) based on newly discovered evidence.⁶ The newly discovered evidence that
4 defendants offered was deposition testimony obtained in the California case that they argued
5 contained coverage-triggering facts (i.e., showed that Nautilus's insureds made false statements
6 about the cross-claimant).⁷ I denied the application because there was no evidence that Nautilus
7 knew of the supposedly coverage-triggering facts before they came out in deposition, which
8 occurred after Nautilus filed this case and I entered my declaratory-relief order.⁸

9 Defendants now apply again on an emergency basis for an order stating that I will
10 entertain or grant their proposed motion for relief from the judgment under FRCP 60(b) based on
11 more newly discovered evidence.⁹ The newly discovered evidence that defendants offer this
12 time is trial testimony and attorney argument regarding jury instructions from the California
13 case.¹⁰ Defendants argue that this evidence contains coverage-triggering facts and, moreover,
14 shows that Nautilus had prior knowledge of them.¹¹ But the evidence does not, in fact, show that
15 Nautilus had knowledge of the purportedly coverage-triggering facts before it filed this case. I
16 therefore deny defendants' application.

17 Discussion

18 "For a declaratory judgment to issue, there must be a dispute [that] 'calls, not for an
19 advisory opinion upon a hypothetical basis, but for an adjudication of present right upon
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21 ⁵ ECF No. 107.

22 ⁶ ECF Nos. 115, 117.

23 ⁷ ECF No. 117 at 2.

24 ⁸ ECF No. 117-1 at 2, ¶ 16 (declaring that the depositions terminated on May 5 and 12, 2017).

25 ⁹ ECF No. 127.

26 ¹⁰ ECF No. 126 at 2.

27 ¹¹ ECF No. 126.

1 established facts.’”¹² I previously explained that Nautilus “sought a declaration that it owed no
2 duty to defend based on the information that it had at the time it filed this case.”¹³ “It did not
3 seek a declaration about whether it might owe a duty to defend in the future—such as if it were
4 presented with new evidence that triggers coverage under its policy.”¹⁴ This is “why my prior
5 orders say: Nautilus owed no duty because there were not yet any allegations or evidence
6 triggering coverage.”¹⁵ This is also why I explained that the previous newly offered evidence
7 was “not relevant to the relief that Nautilus requested in this case[,]” but “[i]f the defendants
8 discovered evidence triggering coverage **and showed that Nautilus knew of it before**, that
9 evidence would potentially implicate this case.”¹⁶

10 Defendants argue that this round of newly discovered evidence contains coverage-
11 triggering facts and shows that Nautilus had prior knowledge of them.¹⁷ The latter requirement
12 is met, say defendants, because a party and witnesses testified in the California case that
13 defendants made business-harming false-representations and cross-claimant’s counsel sought to
14 have the jury instructed on false representation in conjunction with the cross-claims for
15 interference with prospective economic advantage.¹⁸ According to defendants, this testimony
16 and argument make clear that the cross-claimant “was seeking damages against [them] for claims
17 of defamation and/or business disparagement” all along.¹⁹ Indeed, defendants continue,

20 ¹² *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S.
21 227, 242 (1937)).

22 ¹³ ECF No. 118 at 3.

23 ¹⁴ *Id.*

24 ¹⁵ *Id.*

25 ¹⁶ *Id.* at 3 & n.7 (emphasis added).

26 ¹⁷ ECF No. 128-1 at 12–15 (proposed FRCP 60(b) motion).

27 ¹⁸ *Id.*

28 ¹⁹ *Id.* at 13.

“[u]nless [the cross-claimant] made these claims in [his] [cross-]complaint in [the California case], [he] would be unable to assert these false-representation claims at trial.”²⁰

There are several problems with defendants' argument. The largest being that the evidence simply does not show that Nautilus had knowledge of facts **before it filed this case** that would support a possible claim for slander, libel, or disparagement. Nor could it if, as defendants argue, facts later ascertained at trial were needed to "make clear" that is what the cross-claimant was pursuing all along in the California case. The evidence also does not show that the cross-claimant actually alleged or pursued at trial claims for slander, libel, or disparagement, either as stand-alone claims or as part of the ones for intentional misrepresentation. Thus, the offered evidence is not relevant to the issue that was presented to me: whether Nautilus ascertained facts **before it filed this case** that would support a possible claim for slander, libel, or disparagement against the insureds regarding the matters at issue in the California case.

Conclusion

Accordingly, IT IS HEREBY ORDERED that defendants' application for an order indicating that the court will entertain or grant a motion for relief from judgment under FRCP 60(b) based on newly discovered evidence **[ECF No. 126] is DENIED.**

IT IS FURTHER ORDERED that defendants' motion for emergency order shortening time to hear the application [ECF No. 127] is **DENIED** as moot.

Dated: December 29, 2017

U.S. District Judge Jennifer A. Dorsey

²⁰ *Id.* at 14.